TABLE OF CONTENTS

Page No.

I. Preliminary 1

II. The Issues Raised by Luckenbach Before the Commission Were "Material" Issues Within Section 8(b) of the APA 4

A. Unfair competitive practices 4

B. Injury to existing carriers 5

C. The national defense factor 8

III. Conclusion 10

TABLE OF CASES

Cantlay & Tanzola v. *United States*, 115 F. Supp. 72, 81 (1953) 2, 8, 10

Chief Refrigerator Truck Lines, Inc., Extension, 34 M.C.C. 492, 495 6

Clarke v. *United States*, 101 F. Supp. 587, 593 (U.S. D.C. D.C. 1951) 2, 6

Isbrandtsen Co. Inc., Com. Car. Application, 285 I.C.C. 369, 376 ..... 6, 10

Minneapolis Van & Warehouse Company, 6 M.C.C. 477, 480 6

Missouri Pacific Transportation Co., 9 M.C.C. 712, 713 6

Parkhill Extension, 46 M.C.C. 403, 437 6

Pan-American Bus Lines Operations, 1 M.C.C. 190, 203 6

Petroleum from Los Angeles and El Paso to Ariz. and N. Mex., 287 I.C.C. 731, reversed *sub nom. Cantlay & Tanzola* v. *United States*, 115 F. Supp. 72 (1953) 8

Tri-State Transit Co. of La., Extension, 29 M.C.C. 381, 401 6

West Coast Trans-Oceanic SS Line Com. Car. Application, 285 I.C.C. 380, 399-400 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 685

LUCKENBACH STEAMSHIP COMPANY, INC., *Appellant*,

v.

UNITED STATES OF AMERICA ET AL., *Appellees*.

BRIEF OF LUCKENBACH STEAMSHIP COMPANY, INC., OPPOSING MOTIONS TO AFFIRM

A joint motion to affirm was filed by the United States and the Interstate Commerce Commission ("Commission"), and separate motions were filed by Isbrandtsen Co., Inc. ("Isbrandtsen"), and the New Haven Chamber of Commerce. Parr-Richmond Terminal Co. joined in Isbrandtsen's motion. This brief, opposing the motions to affirm, is filed by appellant, Luckenbach Steamship Company, Inc. ("Luckenbach"), pursuant to Rule 7, paragraph 3, of the Rules of the Supreme Court.

I

PRELIMINARY

The motions to affirm, like the opinion below and the report of the Commission, persist in ignoring the critical issues presented by Luckenbach. With respect to the sub-

stantiality of the questions presented on this appeal, the motions do not question the existence of a conflict among the three-judge district courts on whether the Commission must make appropriate findings and affirmatively disclose its reasoning on issues raised under the relevant factors of the National Transportation Policy.[1] Nor is it denied that the Supreme Court has never passed upon the question, important in administrative practice, whether section 8(b) of the Administrative Procedure Act ("APA")[2] means what it says in requiring an agency to give its "reasons or basis" for resolving the material issues presented on the administrative record. These are questions of substantial public importance and deserve plenary consideration by this Court. Indeed, in view of the material issues raised under the National Transportation Policy which were never mentioned in its report, the Commission will inevitably treat affirmance as a holding by the Supreme Court that Commission decisions need not mention, let alone resolve, issues raised under the relevant factors of the National Transportation Policy, and as a direct repudiation of *Cantlay & Tanzola* v. *United States*, 115 F. Supp. 72 (1953) and *Clarke* v. *United States*, 101 F. Supp. 587 (1951).

As indicated in our Statement as to Jurisdiction, the district court recognized the materiality of the issues raised by Luckenbach before the Commission. That court disposed of the case on whether the Commission's report complied with the findings-and-reasons requirement of section 8(b) of the APA. The motions to affirm take a different view. They argue that the issues raised by Luckenbach before the Commission were not "material" and reasons are therefore not required by section 8(b). Since the court below had clearly recognized the materiality of the administrative issues, we touched upon materiality in our Statement merely to indicate that in their decided

[1] 54 Stat. 899.

[2] 5 U.S.C. § 1007(b).

cases the Commission itself and the courts generally regard those issues as material and even controlling (Luckenbach, Statement pp. 17-20).

This brief opposing the motions to affirm is confined, therefore, to establishing that the issues presented to the Commission by Luckenbach are material as applied to the facts of record in this case, and that the appeal thus presents for determination the important and ripe question—upon which the lower courts are now divided—of whether section 8(b) will be enforced according to its terms and purpose.

It will be recalled that in our Statement as to Jurisdiction (which contains the basic considerations of substantiality on this appeal, not repeated herein), we said that three affirmative issues were raised by Luckenbach before the Commission, all directed at whether *shipper* need—to which the Commission limited its report—coincides with the ultimate *public* need for the proposed intercoastal service. Transportation is now so highly integrated that loss of business in one segment of a carrier's service may interfere with its ability to render service over-all, and consequently shipper need is rarely identical with the over-all requirements of transportation policy. Specifically, the three administrative issues bearing on public convenience and necessity were whether the proposed service would (1) foster unfair competitive practices, (2) impair or endanger existing carriers, contrary to the public interest, or (3) contravene the statute's policy to preserve an exclusively intercoastal water service adequate to meet the needs of the national defense for ships readily available in domestic waters, in case of emergency.

In this brief we show how each of these three issues, as applied to the relevant facts on the administrative record in this case, is material.

II

THE ISSUES RAISED BY LUCKENBACH BEFORE THE COMMISSION WERE "MATERIAL" ISSUES WITHIN SECTION 8(b) OF THE APA.

A. Unfair competitive practices.

The threat of unfair competition is not just a technical ground for denial of the Isbrandtsen certificate; it is also the practical reason for Luckenbach's vigorous opposition to certification of Isbrandtsen. Because the same ships, the same service, the same traffic solicitors, and to a substantial extent the same shippers are involved in both Isbrandtsen's unregulated foreign trade and its intercoastal operation, it would be natural for Isbrandtsen to give a large intercoastal shipper more favorable or preferential terms (lower rates or special services) in his unregulated foreign-trade shipments, in order to obtain that shipper's intercoastal cargo at prevailing intercoastal tariff rates, thereby completely foreclosing other intercoastal carriers from competing for that cargo. This leverage constitutes an unfair competitive practice, and the opportunity to engage in it requires denial of a certificate application (see cases cited in Luckenbach's Statement, p. 19).

Indeed on the record made before the Commission in this case, the Scott Paper Company, a large shipper of paper pulp in the intercoastal trade, testified that it shipped a full shipload of pulp each month via Isbrandtsen's vessels from Nova Scotia to Atlantic ports, and that the rates for that monthly shipload were privately negotiated over the table; were not subject to any regulation; were not filed with any Government agency nor even publicly disclosed (Record before the Commission, Witness Dalm, pp. 362-5). Despite this concrete illustration in the record before it of the possibilities of unfair competition, demonstrating the materiality of the issue, the Commission failed even to refer to that issue, and certainly did not give its reasons for disposing of it.

Isbrandtsen argues[3] that because the Commission has complete power to regulate intercoastal freight rates the question of unfair competition is immaterial in a certificate case. The argument is unsound. That the Commission has power to regulate intercoastal rates does not make the question of unfair competitive practices irrelevant where the proposed service will operate across and beyond the borders of the Commission's jurisdiction.[4] Even if the Commission has statutory power to regulate the described practices, it must be remembered that most of Isbrandtsen's foreign trade rates are unfiled, unreported and not even published. Thus, the task of policing those practices is beyond the investigatory capacity of the Commission's staff, and certainly beyond the reach of Isbrandtsen's intercoastal competitors.

The United States and the Commission argue[5] that it was because of Isbrandtsen's unique around-the-world service that the application was granted, and that therefore the Commission must have considered the threat of unfair competition from unregulated foreign trade. It may be that the Commission "considered" this problem, but nothing in its report suggests that the issue was raised before the Commission; certainly no reasons for disposing of it appear in the report.

B. Injury to existing carriers.

In its leading case on the subject, the Commission has held that certification of a new carrier requires a finding that the new operation can be instituted "without endangering or impairing the operations of existing carriers con-

---

[3] Motion to Affirm, p. 14.

[4] As indicated in our Statement as to Jurisdiction, p. 19, the Commission has denied applications in both motor-carrier and water-carrier cases on the sole ground that a mingling of regulated and unregulated operations creates the possibility of unfair competition. We believe therefore that there can be no question but that the issue is substantial.

[5] Motion to Affirm, pp. 5-6.

trary to the public interest" *Pan-American Bus Lines Operations*, 1 M.C.C. 190, 203. This holding has been followed in numerous cases before the Commission.[6] Indeed a statutory district court, in *Clarke* v. *United States*, 101 F. Supp. 587, 593 (U.S.D.C. D.C. 1951), reversed the Commission because it had not made a finding that there would be "no adverse effects upon Atwood [the existing carrier] should the application be granted to Greyhound."

The Commission in the instant case however, far from making a finding that there would be no adverse effects upon the existing services, actually found that there would be a dilution of existing traffic. Thus, the report states:

> "It is evident that the proposed service will not increase to any appreciable extent the volume of traffic moving in intercoastal service. If the proposed service is authorized, *applicant would necessarily have to share some of the existing traffic with the certificated carriers.*" *Isbrandtsen Co., Inc., Common Carrier Application*, 285 I.C.C. 369, 378. (Emphasis added)

The Commission nevertheless failed to consider the effect of this loss of traffic on the operations of the certificated carriers to ascertain whether it would endanger or impair their services, contrary to public convenience and necessity. Without here asserting that the Commission cannot under any circumstances grant a certificate if it finds injury to existing carriers, we do claim that under section 8(b) of the APA the Commission is bound to state in its written report the "reasons or basis" for certificating a new carrier, after having first expressly found that that new carrier would take its prospective cargo from the existing carriers, who are able to carry it and desperately need to retain it.

---

[6] Chief Refrigerator Truck Lines, Inc., Extension, 34 M.C.C. 492, 495; Tri-State Transit Co. of La., Extension, 29 M.C.C. 381, 401; Missouri Pacific Transportation Co., 9 M.C.C. 712, 713; Minneapolis Van & Warehouse Company, 6 M.C.C. 477, 480; Parkhill Extension, 46 M.C.C. 403, 437.

Furthermore, in *West Coast Trans-Oceanic SS Line Com. Car. Application*, 285 I.C.C. 380, 399-400, decided one day earlier by the same division of the Commission that decided this case, the Commission held:

> "One of the determinations that *must be made* in deciding whether public convenience and necessity require applicant's proposed service is whether the proposed service can be instituted without endangering or impairing the operations of existing carriers contrary to the public interest and the National Transportation Policy." (Emphasis added)

Despite this holding in the *West Coast* case, the Commission did not make that required determination in the present case. This is the more remarkable since the evidence as to the financial condition of the competing intercoastal carriers in the *West Coast* case was by stipulation of the parties incorporated into the *Isbrandtsen* case (Record before the Interstate Commerce Commission, p. 1167-8). Thus despite identical evidence in two similar contemporaneous cases, the Commission did not see fit to explain how the issue of impairment of existing operations constituted an essential and material element in one case and could be studiedly ignored in the other.

It is no answer that in the *West Coast Trans-Oceanic* case the Commission was talking about dilution of cargo in the westbound intercoastal trade, whereas in the *Isbrandtsen* case the Commission was considering eastbound service only. Manifestly, if the financial condition of existing intercoastal carriers *operating both eastbound and westbound* is precarious, and a dilution of traffic westbound would endanger or impair their operations, it follows that a dilution of cargo eastbound—which was expressly found by the Commission in this case—would likewise impair or endanger their operations. At least so likely is it that this would occur, that the Commission cannot ignore the issue in the present case, when the APA requires it to state its "reasons or basis" for decision.

C. The national defense factor.

It has been argued by the United States and the Commission,[7] and by Isbrandtsen,[8] that since the Commission was certificating an additional intercoastal carrier the importance to the national defense of Luckenbach's exclusively intercoastal service was not a material factor. This contention assumes that Isbrandtsen's around-the-world ships will not displace Luckenbach's exclusively intercoastal ships. However, since the Commission found that Isbrandtsen would necessarily share some traffic with the existing carriers, there is a distinct possibility that Isbrandtsen ships may displace Luckenbach ships exclusively employed in intercoastal service.

That this possibility alone raises a material issue involving national defense considerations is demonstrated in *Cantlay & Tanzola* v. *United States*, 115 F. Supp. 72 (1953) which, despite the arguments of the United States and the Commission, is apposite. A reduction of 40 percent in the rail rates on petroleum (there under review) would not of a certainty have displaced motor-carrier competition. Indeed, elimination of motor competition was one of the conjectural factors in that case, and one on which the Commission itself was divided, *Petroleum from Los Angeles and El Paso to Ariz. and N. Mex.*, 287 I.C.C. 731, reversed *sub. nom. Cantlay & Tanzola* v. *United States*, 115 F. Supp. 72 (1953). The court in the *Cantlay* case held that in considering the risk that a drastic rate cut might eliminate motor competition in favor of the railroads, the Commission was bound to explain the benefits which outweigh the injury to the national defense. Upon that point it is directly relevant to this case.

It is also urged that the lower court was correct in stating that the national defense issue was not raised before

---

[7] United States and Interstate Commerce Commission Motion to Affirm, pp. 7-8.

[8] Isbrandtsen Motion to Affirm, pp. 10-11.

the Commission because evidence was not introduced on the point before the trial examiner.[9] This argument is without merit. Luckenbach urged the national defense factor of the National Transportation Policy, based upon facts in the record or of which the Commission could take official notice. The particular facts upon which that issue depended were in the administrative record—namely, that Luckenbach operates an exclusively intercoastal service (Record before the Commission, Witness Sinclair W. 2551-55[10]), and that Isbrandtsen's vessels proposed to operate the eastbound intercoastal leg as a part of a long-haul around-the-world operation (Record before the Commission, Witness Crinkley R. 11-14). Moreover, the consequences of World War II in destroying intercoastal operations (Record before the Commission, Witness Sinclair W. 2556-62), the difficulties of postwar rehabilitation of the trade through War Shipping Administration general agency operations (Record before the Commission, Witness Sinclair W. 2566-7, 2587-8, 2595-6), the enormous contribution of the existing certificated carriers to the postwar reestablishment of the trade, amounting to over $11,000,000 (Record before the Commission, Witness Sinclair W. 2559) —Luckenbach's losses alone, in 1947-48, amounting to approximately $2,500,000 (Record before the Commission, Witness Sinclair W. 2556)—were all in the record. Furthermore, the effect of the Korean emergency in disrupting intercoastal operations was testified to upon the record (Record before the Commission, Witness Finnesey W. 2735-41, W. 2870, R. 1093), and was found as a fact by the

[9] Isbrandtsen Motion to Affirm, pp. 8-9; United States and Interstate Commerce Commission Motion to Affirm, p. 7.

[10] Page references prefixed by W rather than R refer to portions of the transcript of record before the Interstate Commerce Commission in the West Coast Trans-Oceanic case which were incorporated in the Isbrandtsen case by stipulation of the parties. That stipulation appears in the record before the Interstate Commerce Commission at pages 1167-8.

Commission *Isbrandtsen Co. Inc., Com. Car. Application,* 285 I.C.C. 369, 376.

The question of national defense policy and military reliance upon domestic shipping in an emergency was the very question committed to the Commission for determination on the basis of officially noticed facts and informal consultation with Government agencies directly responsible for defense aspects of maritime policy, *Cantlay & Tanzola* v. *United States,* 115 F. Supp. 72, 81 (1953). It is thus inaccurate to state that there was no evidence on the defense point in the record.

The national defense argument was thus a vital and pressing question for the Commission to determine in evaluating the public convenience and necessity; the Commission and court cases (Luckenbach Statement, p. 20) proclaim its materiality; and a statement of the Commission's reasons was required before the issue could be administratively disposed of, by mandate of section 8(b) of the Administrative Procedure Act.

III

CONCLUSION

Our quarrel with the Commission is that it decided to certificate Isbrandtsen without mentioning our arguments, let alone giving its reasons for disposing of them. And the Commission did this despite the fact that section 8(b) of the Administrative Procedure Act explicitly requires an agency to give a statement of its "reasons or basis . . . upon all the material issues of fact, law, or discretion presented on the record." The court below recognized that the issues were material, but determined that the Commission complied with the requirements of section 8(b). The motions to affirm apparently agree that the Commission's report in this case does not sufficiently fulfill the reasons requirement of section 8(b), since they principally argue that the issues were not

material and thus the statute did not require reasons. We submit that the district court is correct to the extent that it recognized the clear materiality of the issues presented on the administrative record.

While it has been argued that there *are* reasons for adversely disposing of the issues, it is not and could not be seriously urged that the Commission disclosed its reasons in the report it rendered. The statute does not relegate us to our opponent's explanation of why he prevailed, and if the Commission were required to articulate its reasons we believe it would, in the course of that process, change its mind. In this connection it is important to remember that the full Commission decided this case by a divided vote of seven to four, and an expression of its reasons might readily have caused two Commissioners to change their minds.

For the foregoing reasons the motions to affirm should be denied and this case set down for plenary consideration by the Court.

Respectfully submitted,

ODELL KOMINERS,
HENRY G. FISCHER,
MARK P. SCHLEFER,
Counsel for Appellant.

April 27, 1954